love. In this narrative of simple truth, extorted from a widowed mother, are not wanting attractive and moving descriptions of this kind.

These volumes are closed with a memoir, containing a brief narrative of Captain Tone's services in the light cavalry and staff, until he emigrated from France to the United States, after the battle of Waterloo. It describes in a vivid manner the enthusiasm, buoyant dispositions, hardships, sufferings, and mode of living of that army, so long the terror of Europe. The battle of Leipsic, and the horrors which overspread the field and hung upon the French in their retreat, are the more impressive from the simplicity of the narration. This young officer, after much hardship and many wounds during three campaigns, resigned his commission upon the fall of his great chief, and renounced the prospects of advancement that were still open to him. He brought with him many and high testimonials of his merit, and is now employed in the service of this country, and settled with his mother near the seat of government. He married the daughter of Mr William Sampson, who was the early friend of his father, and many years ago, in his memoirs, published in this country, celebrated his virtues, and paid an affectionate tribute of respect and esteem to her, who had shared his fortunes when living, and by her faithful performance of every duty during a long widowhood, sustained the honor of his name and family.

ART. IV.—*Commentaries on American Law.* By JAMES KENT. Volume I. New York. O. Halsted. 1826. 8vo. pp. 508.

IN the accustomed security of a well regulated community we meet with but few occurrences to remind us of the influence of the laws that are blended in all our transactions, safely conducting us in the crossings and windings of our diverse pursuits, and being ever present to our persons and rights with a vigilant guard and sure protection. Law, in its broadest acceptation, cannot be better described than in the well known passage of Hooker, where he says, 'Of law no less can be acknowledged than that her seat is in the bosom of God; her voice, the harmony of the world; all things in heaven and

earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power.' The kindly guardianship of the municipal laws, and the obedience and reverence due to them, are nowhere more persuasively and beautifully illustrated than in Plato's account of the last scenes of the life of Socrates; where that philosopher, being urged by Crito to avail himself of the means provided for his escape into Thessaly from the execution of the unjust sentence of death passed against him by the Athenians, refuses to fly unless Crito can show it to be consistent with his obligations to the laws, which he introduces as reasoning with him on the proposed escape, reminding him of all the benefits they had conferred upon him, and expostulating with him on the ingratitude of disobeying and bringing reproach upon them, by escaping from even the unjust sentence of death passed against him. Plato finds much to admire and venerate even in laws liable to be capriciously altered and tyrannically administered by an Athenian mob. The old poets and historians are full of eulogies of lawgivers, as among the greatest benefactors of mankind, and similar praise is due to those who reform the laws or their administration, or make them better known, by rendering a knowledge of them more accessible and easy of attainment. Of all sciences or works of human genius, none is more admirable to contemplate, or instructive to study, than a skilfully contrived, well administered system of laws, conferring upon rulers all the necessary powers, and only those, with the requisite counterpoises, checks, and limitations; confining each to his own sphere; distinctly explaining to the citizens their rights and duties in their multiplied and almost numberless relations among themselves and to the government; offering large encouragement to arts, industry, intellectual efforts, and public spirit; and arraying all the moral and physical power of the community on the side of the general welfare, and in defence of the rights and possessions of each individual member. The searching, all pervading power, and sleepless vigilance of the law, bring to light deeds done in secret and darkness, and reclaim and punish offenders for offences committed in the remotest parts of the sea.

But all laws are not good, and good laws are not always well administered. Though the great moral principles more or less aimed at in every body of laws, are themselves unrepealable and unalterable, and remain ever fixed and shining in

the centre of the system, their brightness is too often obscured and eclipsed by the opaque bodies of legislators, and judges, and ministers of the law, interposed. Doctrines are promulgated, armies are raised, and fleets equipped, sometimes to vindicate, but sometimes to violate, the broad, everlasting principles, on which all laws and administrations of law profess to be founded. Legislators, forgetful of the general welfare, declare for law the dictates of a sinister private interest, or a vindictive party spirit. It sometimes happens that what they put forth as oracles of wisdom, bear too much resemblance to riddles, published, like those of the Sphinx, for the destruction of such as get entangled in their interpretation. Though the promotion of the general good, and the protection of private rights, are most commonly the real objects of legislation, yet instances are not wanting in which grave legislative assemblies solemnly decree public calamities, and private wrongs and injustice.

Besides the disorders infecting, in a greater or less degree, every body of laws, evils no less numerous or grievous are incident to their administration. The counsellor to whom you apply, may himself need the advice he professes to give, and conduct you to the proverbial end of the journey of the blind led by the blind; or if not ignorant, he may be dishonest, and make your distress his own opportunity. It will be little consolation to you that your judge is not corrupt, if, like a certain visiter at St Paul's cathedral, he is mazed amid the grandeur, and lost in the windings, cross avenues, and blind passages of the temple of justice in which he is a minister, until he comes to be like so many of the inhabitants of Nineveh, who did not know their right hand from their left. Or if he does not hear without being able to judge, he may judge without waiting to hear, be precipitate, opinionative, ready to decide from prejudice or favor, and instead of searching for grounds to form an opinion, may only search for arguments to defend one already formed. The judges may be appointed from party considerations, or popular or other influence foreign to their qualifications; and so the court, being little skilled in the laws, or the rights of parties, and not capable to decide according to the strength of the case, must be decided by the influence and skill of the parties and advocates, and instead of ruling the strife, be itself the prize for which the parties contend, as a weak prince, in a divided kingdom, gives the victory to the party that makes him prisoner.

If we add to all this, the mistakes and perjury of witnesses, the corruption, inattention, and ignorance of jurors, we shall not be surprised to find that the best laws are sometimes warped and perverted in their practical application, and that, under their best administration, the suitors sometimes prove the difference between a decision by lot and by law, to consist mainly in the expense.

The instances of imperfections and abuses that hover about legislation and legal administration, and strew their train with the ruins of the public prosperity and private property and rights, are too often present to our minds, and serve too much to degrade the law in our estimation; for if we revert to the great mass of rights protected under even an imperfect system of laws indifferently administered, though we may not carry our veneration to the length of voluntarily surrendering life in compliance with an unjust sentence pronounced by a capricious tribunal, still we shall find much to admire in the silent and salutary operation of the laws. At least we cannot but perceive that our possessions, and whatever is admirable and useful in a community, can subsist and last only through the vital energies of the laws; and it therefore behoves us to know something of them; and we owe our thanks for the labors that bring this knowledge more within our reach. Of this description is the work under consideration, professing to embody in a small compass the elements of the law of nations, and of the municipal laws of the United States.

Every part of the volume bears striking traces of the author's learning, and accuracy, and shows a masterly freedom in handling the subject; the first part, however, on the law of nations, is treated with greater elegance and neatness, and, from the nature of the subject, is the most easy and interesting in perusal. In comparison with any similar treatise, it has very considerable novelty, as it embodies, with the doctrines of former works on international law, an abstract of the numerous very learned and able opinions delivered within the last thirty years in the courts of the United States and Great Britain; in mentioning which a just tribute is rendered to the reputation of the present judge of the British High Court of Admiralty.

'The great value of a series of judicial decisions, in prize cases, and on other questions depending on the law of nations, is, that they liquidate, and render certain and stable, the loose general principles of that law, and show their application, and how they

are understood in the country where the tribunals are sitting. They are, therefore, deservedly received with very great respect, and as presumptive, though not conclusive evidence of the law in the given case. This was the language of the Supreme Court of the United States, so late as 1815, and the decisions of the English High Court of Admiralty, especially since the year 1798, have been consulted and uniformly respected by that court, as enlightened commentaries on the law of nations, and affording a vast variety of instructive precedents for the application of the principles of that law. They have also this to recommend them; that they are preeminently distinguished for sagacity, wisdom, and learning, as well as for the chaste and classical beauties of their composition.' pp. 67, 68.

'The most popular, and the most elegant writer on the law of nations, is Vattel, whose method has been greatly admired. He has been cited, for the last half century, more freely than any one of the public jurists; but he is very deficient in philosophical precision. His topics are loosely, and often tediously and diffusively discussed, and he is not sufficiently supported by the authority of precedents, which constitute the foundation of the positive law of nations. There is no one work which combines, in just proportions, and with entire satisfaction, an accurate and comprehensive view of the necessary and of the instituted law of nations, and in which principles are sufficiently supported by argument, authority, and examples. Since the age of Grotius, the code of war has been vastly enlarged and improved, and its rights better defined, and its severities greatly mitigated. The rights of maritime capture, the principles of the law of prize, and the duties and privileges of neutrals, have grown into very important titles in the system of national law. We now appeal to more accurate, more authentic, more precise, and more commanding evidence of the rules of public law, by a reference to the decisions of those tribunals, to whom, in every country, the administration of that branch of jurisprudence is specially intrusted. We likewise appeal to the official documents and ordinances of particular states, which have professed to reduce into a systematic code for the direction of their own tribunals, and for the information of foreign powers, the law of nations, on those points which relate particularly to the rights of commerce, and the duties of neutrality.' p. 18.

While we recollect the injuries done to our neutral commerce by the European belligerents from 1802 down to our declaration of war against Great Britain in 1812, with all the complaints, animosities, and collisions, which led to that declaration, it is gratifying to find that as far as the same questions, relating to neutral rights, have come before the judicial tribunals of the two countries, the decisions generally coincide, and

are cited together page after page, in this treatise, in support of the same doctrines; a coincidence, which cannot but strengthen the confidence of each nation in the judicial tribunals of the other, while it affords a pleasing illustration of the uniformity and certainty of the practical operation of the law of nations. Chancellor Kent mentions but a single instance of diversity of decision in the two countries upon a point of any importance. This was in the case of a shipment of neutral goods on board of an armed belligerent cruiser, whereby, in the opinion of Lord Stowell, the neutral character of the goods was forfeited. (The Fanny, 1 Dodson, 443.) The Supreme Court of the United States, on the other hand, held this not to be a forfeiture of neutral character, even though the vessel should make resistance, provided the neutral shipper did not contribute to the expenses of the armament, otherwise than by paying freight. (The Nereide, 9 Cranch, 388.) The reason given by Lord Stowell in support of his opinion is, that the neutral 'showed an intention to resist visitation and search.' But cases might occur in which goods would be shipped on board of an armed belligerent vessel for want of any other. Besides, it might be said with as much reason, perhaps, that a neutral ships on board of an unarmed belligerent with the intention of escaping from search, and yet if he should so ship, with this specific purpose, no court would hold this to be a forfeiture of neutral character.

An act of Congress, of 1790, declares every offence committed at sea to be piracy, which if committed on land would be punished with death. By the act of May, 1820, 'If any citizen of the United States, being of the crew of a foreign vessel engaged in the slave trade, or any person, being one of the crew of a vessel owned or fitted out in the United States, who shall land on any foreign shore and seize any negro or mulatto, with intent to make him a slave, or shall decoy or forcibly bring him on board with like intent, such citizen or person shall be adjudged a pirate, and suffer death.' These acts enlarge the description of piracy, but they can operate, as indeed the last is intended to do, only on citizens of the United States; for no nation can alter the law of nations except so far as its own consent and practice may concur with those of other nations, and go to make a general usage. Piracy being an offence against the law of nations, its description and punishment must be regulated by that law, and the giving this

name to any other crime in a statute, is only a misapplication of the word.

A large portion of this volume is occupied with the constitutional laws and jurisprudence of the United States, in which the author has given a concise, clear, and well arranged compendium of all the questions of this sort, made subjects of judicial discussion and decision since the adoption of the constitution. He commences with a sketch of the articles of confederation, to the defects of which and the embarrassments of the government in administering the affairs of the nation under such an imperfect organization, we are indebted for a better constitution than the states would otherwise have consented to adopt. A short history is then given of the adoption of the constitution, the most striking features of which are portrayed in a masterly manner, illustrated with abstracts of all the important judicial constructions of that instrument. On the subject of the choice of the president, the author says;

'The mode of his appointment presented one of the most difficult and momentous questions that could have occupied the deliberations of the assembly which framed the constitution; and if ever the tranquillity of this nation is to be disturbed, and its peace jeopardized, by a struggle for power among themselves, it will be upon this very subject of the choice of a president. This is the question that is eventually to test the goodness, and try the strength of the constitution; and if we shall be able, for half a century hereafter, to continue to elect the chief magistrate of the union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character, and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration of the more enlightened part of mankind.' pp. 255, 256.

The election of the chief magistrate has agitated, and will doubtless again agitate our political system, and if it shall, at some time, be coupled with sectional questions, in which the conflicting passions and interests of the different parts of the country shall be deeply engaged, it may be the immediate occasion of the disruption of the Union. But it must be a stronger motive, and a more homefelt interest, than merely the bestowing the office upon the favorite candidate of either party. It must be the breaking out of long fomented passions, and accumulated injuries, jealousies, and irritations. Attachment to the confederation, and a feeling that the strength, security, and prosperity of the states, depend upon maintaining the

integrity of the union, are daily growing deeper and stronger in all parts of the country, and becoming a fixed sentiment, that is to be admitted and acted upon at all times. And though we are apt to overrate the improvements in knowledge, virtue, or skill, from generation to generation, yet it can hardly be doubted that men do better understand the science of government, and are better instructed in its administration, than they have been heretofore; and as far as any such improvement has been made, it will be powerfully auxiliary to our institutions.

A great difficulty in our own, as well as all other free governments, is to apportion the powers and jurisdictions so that they may duly counterpoise and mutually check each other, without confusion or collision. As the legislation and judicial administration of the United States, always border upon those of the several states, and are often blended with them by a concurrence of application to the same subjects and parties, it is a delicate and difficult office to disentangle the one from the other, and define their respective boundaries. Some questions on this subject have, for a time, disturbed the harmony of our government, and even threatened its stability. But fortunately most of these questions are brought in the first place before the judicial tribunals, and thus being far removed from all rash and violent proceedings, are made the subjects of elaborate investigation and solemn decision. Accordingly, as long as the Supreme Court of the United States shall continue to be an august tribunal of judges, holding their offices by a permanent and independent tenure, and the courts of the more powerful states shall be of a similar character, the jarrings between the general and state jurisdictions, both in legislation and jurisprudence, are likely to terminate as they have hitherto terminated, in marking more definitely their respective limitations, and in proving, as well as adding to, the strength of our political institutions. Under all governments, the civil power acts directly upon the subjects, in most instances, through the judicial tribunals, and all the laws become tinged with the character of those tribunals; but in the United States, and in many of the states, the political organization is such, that the judiciary imparts much of its spirit and character to the legislative and executive branches of the government. These tribunals are the central links which bind together our whole political system, and being once broken, the whole system must fall to ruin.

We will follow Chancellor Kent in his recapitulation of the principal cases of concurrent and contested jurisdiction and powers under the general and state governments, as far as they have been made the subjects of judicial discussion and decision. Under the provision of the constitution as it was originally adopted, giving the Supreme Court jurisdiction of suits against a state by citizens of other states or foreigners, a number of suits were early commenced, and among them one against the state of Georgia, in which, however, that state, though it employed counsel, refused to have any appearance made in behalf of the state, whereby the jurisdiction of the court might be acknowledged. On a motion of plaintiff's attorney for a writ of inquiry of damages, the judges went very elaborately into the consideration of the question of the jurisdiction of the court, four of them being of opinion that the court had jurisdiction; from which opinion Mr Justice Iredell dissented.

'But the states were not willing to submit to be arraigned as defendants before the federal courts, at the instance of private persons, be the cause of action what it may. The decision of the Supreme Court of the United States, in the case of Chisholm *versus* The State of Georgia, decided in 1793, in which it was adjudged, that a state was sueable by citizens of another state, gave much dissatisfaction, and the legislature of Georgia carried their opposition to an open defiance of the judicial authority. The inexpediency of the power appeared so great that Congress, in 1794, proposed to the states an amendment to that part of the constitution, and it was subsequently amended in this particular under the provision in the fifth article. It was declared by the amendment, that the judicial power of the United States should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.'

p. 278.

Upon a case coming up from a Virginia court, a question arose as to the appellate jurisdiction of the Supreme Court of the United States.

'In the case of Fairfax *versus* Hunter, a writ of error from the Supreme Court of the United States, was awarded to the Court of Appeals of Virginia, upon a judgment in that court against the right claimed under a construction of the treaties made with Great Britain in 1783 and 1794, and the judgment of the Court of Appeals was reversed, and the cause remanded, and the Court of

Appeals below were required to cause the original judgment which had been reversed in that court, to be carried into due execution. The Court of Appeals, when the cause came back to them, resolved that the appellate power of the Supreme Court of the United States did not extend to that court, and that so much of the act of Congress as extended the appellate jurisdiction of the Supreme Court to that court, was not warranted by the constitution; and that the proceedings in the Supreme Court were *coram non judice* in relation to that court, and they, consequently, declined obedience to its mandate. A writ of error was awarded upon this refusal, and the cause came up again before the Supreme Court of the United States.' pp. 296, 297.

'The Supreme Court, by a train of reasoning which appears to be unanswerable and conclusive, came to the decision, that the appellate power of the United States did extend to cases pending in the state courts, and that the 25th section of the judiciary act of 1789, authorizing the exercise of this jurisdiction in the specified cases by a writ of error, was supported by the letter and spirit of the constitution. The judgment of the Court of Appeals in Virginia, rendered on the mandate in the cause, and denying the appellate jurisdiction of the Supreme Court, was consequently reversed, and the judgment of the District Court in Virginia, which the Court of Appeals in Virginia had reversed, was affirmed.'

p. 300.

The case of the United States *versus* Judge Peters, 5 Cranch, 115, occurred in 1809, on a cause of action occurring as early as 1778, respecting the proceeds of a captured ship and cargo, claimed by the state of Pennsylvania, but awarded to other claimants by the committee of appeals in the Congress under the old confederation; and the proceeds of the prize had in the mean time remained in the hands of stake holders. In 1803, the legislature of Pennsylvania passed an act requiring the governor to direct the attorney general of the state to apply to the stake holders, and 'require them forthwith to pay the monies by them received, into the treasury of that commonwealth, and in default thereof, to direct the said attorney general to bring a suit in the name of the commonwealth, in the proper court of the commonwealth, against the said E. S. and E. W. [the stake holders] for the monies aforesaid;' 'to proceed as speedily,' &c. 'and that the governor be authorized and required, and he is hereby authorized and required, to protect the just rights of the state, in respect to the premises, by any further means and measures that he may deem neces-

sary for the purpose, and to protect the persons and properties of E. S. and E. W. from any process whatever, issued out of any federal court in consequence of their obedience to the requisition aforesaid directed to be made to them by the attorney general.' The stake holders accordingly paid the monies into the treasury of the state, on receiving a bond of indemnity; but the Supreme Court of the United States ordered the district judge of the United States in Pennsylvania, to issue execution in favor of the other claimants against the stake holders.

In the case of McKim *versus* Voorhies, 7 Cranch, 279, it appears that a Kentucky court, under a law of that state, of 1807, issued an injunction to stop the proceedings in a case in the Circuit Court of the United States for that district, and the clerk of that court, having notice of the injunction, hesitated to issue an execution upon a judgment rendered in that court. The question coming before the Supreme Court of the United States, it was ruled that the Circuit Court should order its clerk to issue the execution.

A question somewhat similar has arisen on the operation of the Kentucky *stop laws*, as they are called; a species of law whereby the legislature enacts that private contracts shall not be binding, and that another contract shall be substituted for the one made by the parties. They are also called 'relief laws,' from the circumstance of their relieving men from their legal obligations. They are a species of political nostrum that aggravate the disorder intended to be remedied; which have however been resorted to in many instances under the colonial governments, and since the revolution, in those cases which cannot be relieved by any treatment, and are better left entirely to the constitutional energies of the patient. By one of these laws passed in Kentucky, it was provided, among other things, that a judgment debtor might tender a certain description of Kentucky bank paper, in satisfaction of the execution. In Weymouth *versus* Southard, 10 Wheaton, 1, the question came before the Supreme Court of the United States, whether this state law was applicable to an execution issued upon a judgment recovered in a court of the United States in the district of Kentucky.

'It was decided, that Congress had exclusive authority to regulate proceedings and executions in the federal courts, and that the states had no authority to control such process; and, therefore, executions by *fieri facias* in the federal courts, were not

subject to the checks created by the new Kentucky statute. It was, in that case, further observed, that the forms of execution, and other process in the federal courts, in suits at common law, except modes of proceeding, were to be the same as used in September, 1789, in the supreme courts of the states, subject only to alterations and additions by Congress, and by the federal courts, but not to alterations since made in the state laws and practice.' p. 370.

This decision, and some others of the Supreme Court, have given great dissatisfaction to some of the people of Kentucky, and provoked much virulent declamation against the court itself. During the late session of Congress, some member intimated that a judicial tyranny was secretly creeping in upon us; and, if we rightly remember the tenor of his discourse, we are to suppose that the venerable Chief Justice Marshall is little other than a Dionysius the Second, who uses the court as a whispering gallery, for discovering subjects upon whom to exercise his tyranny and cruelty. But notwithstanding all that has been said to the contrary, we verily believe that the citizens, excepting those few who are afraid justice may be done them, feel their persons and rights almost as safe in the hands of the Supreme Court of the United States, as in those of some of the states. But to proceed with our subject.

In McCulloch *versus* The State of Maryland, 4 Wheaton, 316, it appears that a law of that state required all banking institutions in the state to use a particular species of paper for their bank notes, and also imposed a tax upon banks within the state. Mr McCulloch, the cashier of the branch bank of the United States in Baltimore, had issued notes of that bank on paper different from that prescribed in the Maryland act. A suit was accordingly instituted against him in a Maryland court, to recover the penalty supposed to be incurred under the state act; and the case being carried up to the Supreme Court of the United States, opened for discussion the whole question of the power of a state to tax the bank of the United States, or otherwise obstruct its operations. It was decided that the state could not in this case recover either the tax or the penalty, under the state act.

In Osborn *versus* The Bank of the United States,9 Wheaton, 316, a similar question occurred, respecting a tax on a branch of the same bank, in the state of Ohio. The officer of the state, under a warrant of the state treasurer, and in pursuance

of the particular directions of the state law, seized upon specie and bank notes, in the vaults of the bank, to a large amount, to satisfy the tax, and paid the same into the state treasury. But the Supreme Court of the United States, in this, as in the former case, held the state law, as far as it was intended to apply to the bank of the United States, to be unconstitutional and void, and consequently to afford no protection to those who acted under it, who were therefore held to be answerable to the bank of the United States for the money or other property taken.

An interesting question occurred in Cohens *versus* Virginia, 6 Wheaton, 264, relative to the jurisdiction of the Supreme Court of the United States in a case to which a state is a party. Some tickets of a lottery granted by Congress in the district of Columbia, had been sold by Cohens in Virginia, where a law was in force prohibiting the sale of tickets of any lottery not granted by that state. Cohens was indicted and convicted, and judgment was given against him in the Virginia courts, for the penalty under the state law. The case was brought before the Supreme Court of the United States by writ of error. Here, then, was a case in which a state was a party, and the amendment of the constitution had withdrawn from the Supreme Court of the United States jurisdiction of suits against a state; and yet if a state could thus exclude the jurisdiction of the Supreme Court, it might, by enacting statutes with penalties, utterly exclude the jurisdiction of the national courts, and stop the administration of the laws of the United States. The Supreme Court, however, decided that a case arising under the constitution, treaties, or laws of the United States, came within their jurisdiction, whoever might be the parties. Chancellor Kent says, 'The constitutional authority of the appellate jurisdiction was vindicated with great strength of argument and clearness of illustration,' and it was the opinion of the court that the law granting the lottery, being a law of the United States, could not be obstructed by the laws of any state.

In Diggs and Keith *versus* Wolcott, 4 Cranch, 179, it was held generally, without any reasons being assigned for the opinion, that the courts of the United States have no authority to enjoin parties not to proceed in a state court. Chancellor Kent says, 'This decision is not to be doubted;' and cites the case of Kennedy *versus* The Earl of Cassilis, 2 Swanston,

330, in which Lord Eldon had granted an injunction in the English Court of Chancery to restrain a party from proceeding in the Court of Sessions in Scotland, where the parties were domiciled. It was admitted that the Court of Sessions was a court of competent jurisdiction, and was an independent foreign tribunal, subject, however, like the Court of Chancery, in England, to an appeal to the House of Lords. It was urged, that if chancery could in this way restrain proceedings in the sessions, the sessions might equally enjoin proceedings in chancery, and thus all proceedings in either court would be stopped. Lord Eldon said, 'he never meant to go further with the injunction than the property in England, and, on motion, he dissolved it *in toto*.' Without entering into the argument, it seems to us however, that the cases are not precisely parallel. The English Court of Chancery has no appellate jurisdiction over the Scotch Court of Sessions, whereas the Supreme Court of the United States has appellate jurisdiction over the state courts in certain cases. An injunction from the House of Lords would have been more similar. Nor does the general question appear to us to be so plain, that the decision in Diggs *versus* Wolcott, the grounds of which are not stated, ought to be of great weight.

A class of important cases has arisen under the provision of the constitution that no state shall pass any laws impairing the obligation of contracts.

'The case of Fletcher *versus* Peck, 6 Cranch, 87, first brought this prohibitory clause into discussion. The legislature of Georgia, by an act of 1795, authorized the sale of a large tract of land, and a grant was made by letters patent in pursuance of that act, to a number of individuals under the name of the Georgia Company. The legislature, by an act of 1796, declared the preceding act to be void, as being founded in corruption.' pp. 387, 388.

The Supreme Court of the United States were of opinion, however, that

'When a law was in its nature a contract, and absolute rights have vested under that contract, a repeal of the law would not devest those rights, nor impair the title so acquired.' p. 388.

Under the same clause decisions have been made relating to the state bankrupt laws, and finally,

'In the great case of Dartmouth College *versus* Woodward, the inhibition upon the states to impair the obligation of contracts received the most elaborate discussion and the most instructive

application.' 'The argument of the Supreme Court in this celebrated case, contains one of the most elaborate discussions of the constitutional sanctity of contracts to be met with in any of the reports. The decision in that case did more than any other single act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government, and to give solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country.' p. 389, 392.

The subject of the monopoly of steamboat navigation in the state of New York, granted by the legislature of that state to Livingston and Fulton, is treated somewhat at length by Chancellor Kent, and the final decision of that question by the Supreme Court of the United States, does not meet his entire acquiescence. As far, however, as the case turned upon the constitution, or the constitutional right of Congress 'to regulate commerce among the states,' he says there was a perfect coincidence of opinion in the Supreme Court of the United States and the courts of New York. It is admitted that Congress was authorized by the constitution to pass an act protecting a coasting vessel passing, as was the steamboat in the case in question, from one state, to any part of another, from interruption or restraint from the laws or authorities of the state to which, or through any part of which, she might be passing. Though Chancellor Kent thinks some expressions used by the judges of the Supreme Court in their opinions, are a little broader than the principles assumed by them will bear out, yet as far as the case then under consideration went, there was, in his view, no constitutional question in dispute between the Supreme Court and the legislature and courts of New York. The Supreme Court of the United States were of opinion that the act of Congress respecting the coasting trade, whereby Congress made provision for granting 'a license to carry on the coasting trade,' did in fact authorize vessels properly qualified and licensed to carry on that trade without interruption from the state laws and regulations, except the health laws, inspection laws, &c. or, in other words, without being liable to be required by any state to take out a new license. But the Chancellor seems to consider the coasting act to be merely prohibitory, providing that no other than vessels licensed under that act could carry on the coasting trade; but until some new act of Congress should be passed, it must de-

pend on the regulations of the state laws, whether a vessel so licensed should be authorized to carry on the coasting trade. According to this construction, the states might, by a course of what Mr Webster calls 'belligerent legislation,' grant monopolies of navigation, whether by steam, sails, or oars, in each state, to particular persons, and thus each state absolutely prohibiting coasting navigation in its waters to all vessels except those owned by the monopolists, all coasting trade would have been at an end between and among the states, or from one state to another, until Congress should have passed some act controlling and superseding these laws of the states; a doctrine which would certainly be very inconvenient in practice.

Chancellor Kent says, 'The only great point on which the Supreme Court of the United States and the courts of New York have differed, is in the construction and effect given to a coasting license.' p. 411. And yet he says, 'It has always appeared to me, that some of the doctrines and expositions of the court would carry the powers of the general government, by construction, to a greater extent over the residuary claims and assumed rights of the states, than any decision which had hitherto been made.' p. 409. In short, though he speaks very respectfully of the Supreme Court of the United States, the author does not fully acquiesce in their decision, but labors to vindicate the opinions which he himself, and the other judges in New York had given on the same questions. This is very natural; and every man in the community has a right to suggest doubts of the correctness of any decision of any court in the country, and to offer arguments in opposition to them, and few men in the United States can give greater weight of authority to their opinions and arguments. But we should have been more gratified had we met this vindication in some other place than an elementary treatise professedly intended as a book of instruction. And notwithstanding all the arguments to the contrary, we cannot but think that the whole tenor and implication of the provisions in the act of Congress respecting the coasting trade, suppose and take for granted that the vessels licensed under that act shall have the privilege of carrying on the coasting trade among the several states; for the very provision that no other vessels shall carry on the coasting trade, is equivalent to a provision that these vessels shall have that privilege.

These are the principal cases in which the legislative and judicial administration of the government of the United States have come in collision, or been entangled with those of the states. Some of these questions are of vital importance, and if the constitution had not authorized these decisions of the Supreme Court, the government of the country must have been brought to a stand, and the present constitution would have been little better than the articles of the old confederation; and the country can never be too grateful to those judges who have, with so much dignity, impartiality, and firmness, and so learnedly, ably, and laboriously, applied the principles and provisions of the constitution and laws to the many difficult and embarrassing cases that have arisen. While such shall be the administration of the laws, we may continue to be proud of our political institutions, but no longer; for it is quite apparent that an able and independent judiciary is the palladium of our institutions; and those persons who are assailing this part of our government, are, some of them, perhaps, intentionally, but more, no doubt, unwittingly, aiming their blows at the vital part of our civil polity.

It has been represented by some writers, that our frame of government is very simple, and one that a schoolboy may master when he is able to read the constitution of his own state and that of the United States. The questions and discussions we have been considering show, that any such notion can be entertained only by persons very superficially acquainted with the constitution and laws. We are wont to boast of our government as free, and very justly, but we refer that freedom too much to the mere circumstance of the popular election of the rulers, and we fall too readily into the notion that every other country would be as well governed as ours, were the rulers similarly elected; not considering that history is full of examples of changeable, capricious, and tyrannical laws, and atrocious abuses of power, in governments as popularly constituted as our own. One species of freedom enjoyed in this country consists in the perfect equality of all political and civil rights; no one being politically disqualified from aspiring to, and none being, in preference, politically privileged to aspire to, any honor or power in the gift of the community or the government. But, after all, whatever name you give the government, the main question, with the great mass of the community, relates to the laws or rules of conduct, whereby their

actions and rights are to be regulated. If the laws are wisely framed and well administered, with some political guaranty of their continuing to be so, the government is a good one. Laws to be good must be certain, and rights to be enjoyed and vindicated must be defined and known. In our constitution we have a sufficient guaranty that public opinion will always be consulted; so it was at Athens, and yet no man's person or rights were safe in that republic. To make this of any avail, it is necessary that this opinion should be guided by some intelligence and discretion; it must also have convenient instruments and organs by which to operate; legislatures, judicial tribunals, executive, military, and civil officers, whose powers and functions must all be justly apportioned and clearly limited and defined. No government is a good one in which all the powers and rights of the rulers and the ruled are not well assigned and well understood. In the United States, every citizen is a subject of two governments, that are, in some measure, independent of each other. To settle the boundaries of these two governments, and then to adjust all the powers, rights, and relations under each, though it may not require a scheme of government so complicated as that of the Germanic confederacy, yet certainly cannot be done by some simple plan conceived without labor, and that may be understood without study, and explained and applied without doubt or difficulty. Such a system must be in some measure complicated; and we apprehend that no good government can be very simple in its structure.

The remaining part of this volume is occupied with a general account of the sources of municipal law, namely, statutes, the common law, and the civil law. The English reports, and earlier treatises and digests being the fountains of knowledge of the common law, constitute the subject of two lectures, in which the author gives a cursory sketch of those of greatest authority and most frequent reference. The outline of these works is, as might be expected from a man who has spent so great a part of his life in perusing and consulting them, very just, and will be very useful to the student in directing his studies. Perhaps one exception ought to be made, for it seems to us the author somewhere gives too high a character of Lord Chancellor Thurlow, whom we have not been accustomed to rank among the most accurate, learned, and profound lawyers.

Respecting the authority of the courts to decide upon the constitutionality of a law, the author makes the following remarks;

'The principle in the English government, that the Parliament is omnipotent, does not prevail in the United States. In this, and all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the government, an act of the legislature may be void as being against the constitution. It must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution of its own state, and if it infringes the provisions of either, it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution, and to regard the constitution, first of the United States, and then of their own state, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform. The constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the constitution, is absolutely null and void. The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the constitution, is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature, when it appears to them to have been passed in violation of the constitution, would be to contend, that the law was superior to the constitution, and that the judges had no right to look into it, and to regard it as the paramount law.' pp. 420, 421.

After recapitulating the several earlier cases on this question, Chancellor Kent says,

'The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any state legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration.

'The question, said the chief justice, was, whether an act, repugnant to the constitution, can become a law of the land, and it was one deeply interesting to the United States. The powers of the legislature are defined and limited by a written constitution. But to what purpose is that limitation, if those limits may at any time be passed? The distinction between a government with limited and unlimited powers is abolished, if those limits do not

confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. If the constitution does not control any legislative act repugnant to it, then the legislature may alter the constitution by an ordinary act. The theory of every government, with a written constitution, forming the fundamental and paramount law of the nation, must be, that an act of the legislature repugnant to the constitution is void. If void, it cannot bind the courts, and oblige them to give it effect; for this would be to overthrow, in fact, what was established in theory, and to make that operative as law which is not law. It is the province and the duty of the judicial department, to say what the law is; and if two laws conflict with each other, to decide on the operation of each. So if the law be in opposition to the constitution, and both apply to a particular case, the court must either decide the case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law. If the constitution be superior to an act of the legislature, the courts must decide between these conflicting rules, and how can they close their eyes on the constitution and see only the law?' pp. 424, 425.

This doctrine has been sometimes doubted, and remarked upon with asperity, by the more superficial and less experienced legislators. But since every citizen is entitled to the protection and privileges guarantied by the constitutions of the United States and the states, he has a right to demand that the courts in applying the laws to his person, his property, or his interests, should be controlled and guided by those constitutions. And what renders the contrary doctrine absolutely impracticable is, that the Congress and the states may pass, and in fact in some instances have passed, laws inconsistent with each other, and therefore, if the courts could not look beyond the law into the constitution, but were bound to accept as constitutional and valid whatever the Congress or state legislatures might enact, this would not only deprive the citizens of the benefit and protection of the constitutions, but would also involve the judicial tribunals in the absurdity of applying and administering inconsistent and contradictory propositions.

The extracts we have made sufficiently illustrate the general style of the execution of this work, and would, of themselves, be a sufficient recommendation of its character, if any other recommendation were needed than the reputation of the author. We have noticed a few instances of defectively constructed sentences, on pages 122, 142, and 163, which would be less

worthy of notice, were not the work intended more particularly for readers of the younger class in the profession; they would, however, be blemishes in any work, for whatever description of readers intended. But, in general, it is written with great ability, and, when completed by the publication of the additional volume promised, will doubtless supply the student with the best outline of the law within his reach; and we can entertain no doubt that a book which was so much needed will be very favorably received.

ART. V.—*Indian Treaties, and Laws and Regulations relating to Indian Affairs; to which is added an Appendix, containing the Proceedings of the Old Congress, and other important State Papers in relation to Indian Affairs. Compiled and published under Orders of the Department of War.* 8vo. pp. 529. 1826. Washington. Way & Gideon.

WE have placed the title of this work at the head of the present article, not only because it is a valuable compilation, judiciously executed, but because it contains many important documents, exhibiting the general policy of our government in its intercourse with the Indians. The true character of this policy has not been well understood, even in this country, and abroad it has too often furnished the motive or the pretext for grave accusation and virulent invective. This subject we now propose to examine, and in connexion with it briefly to review the conduct of the two rival nations, whose general measures in peace and war had produced the most permanent effects upon the manners, and morals, and condition of the Indians, previously to the existence of the American government. The operation of the British policy has been so much more extensive and durable than that of the French, that in the observations which we shall submit to our readers, this relative importance will be kept in view.

The peace of 1763 terminated the long contest between the French and British, for superiority upon the North American continent. During its continuance, which exceeded a century, the Iroquois were in the English interest, and the other